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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/076,692	02/16/2002	Jose E. Leal		1457

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Joseph Funk
82 Chase Road
Londonderry, NH 03053

EXAMINER

BROCKETTI, JULIE K

ART UNIT	PAPER NUMBER
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3713

DATE MAILED: 03/25/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/076,692

Applicant(s)

LEAL ET AL. 

Examiner

Julie K Brockett

Art Unit

3713

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 January 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-17, 20-22, 27-29 and 31 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-17, 20-22, 27-29 and 31 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 01 July 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input checked="" type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Drawings

New corrected drawings in compliance with 37 CFR 1.121(d) are required in this application because Applicant needs supply "Replacement Drawings" not just marked up corrected drawings. Furthermore, Applicant is advised to employ the services of a competent patent draftsman outside the Office, as the U.S. Patent and Trademark Office no longer prepares new drawings. The corrected drawings are required in reply to the Office action to avoid abandonment of the application. The requirement for corrected drawings will not be held in abeyance.

Claim Objections

Claim 27 is objected to because of the following informalities: It is dependent on claim 24, which was cancelled. Appropriate correction is required. For this office action it was assumed that claim 27 is to be dependent on claim 20.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 6-8 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 1 states that the transmitter is located in the plate while claim 6 states that the transmitter is located on the individual. These claims are in conflict with one another. The transmitter is either in the plate or on the individual, based on the claims as written, the transmitter can not be in both at the same time unless there are two transmitters which is not mentioned in the claims.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-4, 13, 15, 20, 21 and 27 are rejected under 35

U.S.C. 102(e) as anticipated by or, in the alternative, under 35

U.S.C. 103(a) as obvious over Brown, U.S. Patent No. 6,440,013 B1 in view of Lipps, U.S. Patent No. 5,741,182. Brown discloses a method for an individual to have hitting practice and hitting practice training equipment for use by an individual. The equipment includes a ball to be hit by the individual as part of hitting practice (See Brown col. 2 line 54). A pitching machine is

used to propel the ball (See Brown Fig. 1A, abstract). It is implicit to the system that there is a means for striking a ball propelled by the propelling means to impose a force by the striking means against the ball. For example Brown discloses that his pitching machine is used for batters in batting practice. Therefore, it is implicit that the batters have bats for striking the balls and when the batters do strike the balls with the bats a force is imposed against the balls. However, if it is not implicit that the batters described in Brown have bats it is certainly obvious under 35 U.S.C. 103. One of ordinary skill in the art at the time the invention was made would know that a batter would have a striking means, i.e. a bat, for striking a ball, i.e. ball, thereby imposing a force by the striking means against the ball. A pitching machine to be used by batters is not helping the batters unless they have a bat to practice hitting the balls with. Consequently, a batter would use a bat and pitching machine together in order to improve their batting ability [claims 1, 4, 12, 20, 31]. Brown discloses a plate on the ground toward which the ball is propelled by the propelling means (See Brown 9 lines 6-12) [claim 1, 20]. Brown further discloses a transmitter being separate from the striking means and the hands of the individual. The transmitter is used to transmit a signal that causes a ball to be propelled by the propelling means. The transmitter is operated by the individual using the training equipment (See Brown Fig. 4A, col. 4 lines 17-19; col. 8 lines 47-63; col. 9 lines 44-58) [claims 1, 20, 31]. A receiver is used for receiving the transmitted signal. The receiver causes the actuation of the

propelling means to propel a ball to be hit by the individual using the striking means (See Brown col. 8 lines 54-57) [claim 2]. The signals are transmitted on a wireless basis to the receiver (See Brown col. 8 lines 54-57) [claims 3, 20].

The remote control allows for selectively controlling the transmitter to transmit ones of a plurality of signals that the receiver and the propelling means respond to and propel a ball in a different manner for each one of the plurality of signals (See Brown col. 3 lines 63-67; col. 9 lines 44-58) [claims 13, 15, 27]. The individual causes the transmission of the signal when they are ready to attempt hitting a propelled ball (See Brown col. 9 lines 44-54) [claims 21].

Brown lacks in disclosing that a home plate contains the transmitter [claims 1]. Lipps teaches of a baseball game, which uses a bat and a home plate. The home plate contains a transmitter and the transmitter is actuated to send the transmitted signal by touching the home plate with the baseball bat (See Lipps Fig. 2; col. 3 lines 46-52, 63-67) [claims 1]. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use a home plate containing the transmitter in the invention of Brown. When players take batting practice they like to stand in front of home plate in order to get the feel of a real "at-bat" as well as to position themselves in their batting stance relative to the plate. Furthermore, it is obvious that one could place the transmitter in the plate as in Lipps so that players could control the buttons on the controller by using their bat or their hands [claims 21]. It is well known for batters to tap home plate prior to batting; therefore, by having the transmitter

in home plate, players could simply do the same actions as they would in a normal batting situation while also actuating the propelling mechanism.

Claims 5, 10-12 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brown in view of Lipps in further view of Sharp, U.S.

Patent No. 5,133,330. Brown teaches that the signals are transmitted on a wireless basis to the receiver (See Brown col. 8 lines 47-63) [claim 11]. In Brown previously it is either implicit that the striking means is a bat or it is certainly obvious for the reasons stated above (See Brown col. 2 line 67; col. 3 lines 1-8) [claim 12]. Brown lacks in disclosing a delay in the actuation of the propelling means [claims 5, 10, 22]. Sharp teaches of a pitching machine in which when the machine receives the signal to cause the actuation of the propelling means to propel a ball a delay occurs for a short period of time (See Sharp abstract, col. 1 lines 52-54; col. 2 lines 30-34) [claims 5, 10, 22]. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have a delay after the receiver receives the transmitted signal in Brown so that the actuation of the propelling means is delayed. By delaying the throwing of the balls, the players can get into their batting stance and be ready for the pitch versus being surprised immediately by balls being thrown at them.

Claims 14, 16, 17, 28 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brown in view of Lipps in further view of

Trajkovic et al., U.S. Patent No. 6,539,931. Brown lacks in disclosing a

voice activated means [claims 14, 16, 17, 28, 29]. Trajkovic teaches of a ball throwing assistant comprising voice activated means that responds to the individual's voice for causing the propelling means to respond and propel a ball in a different manner for each one of the plurality of voice actuated signals (See Trajkovic col. 5 lines 5-15, 25-33) [claims 14, 16, 17, 28, 29]. It would have been obvious at the time the invention was made to use voice actuated signals in the invention of Brown so that the transmitter could transmit a signal to the receiver and the propelling means in response to a voice signal by the user. By using voice signals, the player's hands are free to hold the bat and maintain the batting stance. Consequently, the player can concentrate on batting and his physical position rather than pressing the correct buttons on a remote control.

Claims 6 and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brown in view of Lipps in view of Weske et al., U.S. Patent No. 6,575,837 B1. Brown discloses that the transmitter is located apart from the striking means and the hands of the individual and that the individual actuates the transmitter to transmit the signal that causes the ball to be propelled by the propelling means [claim 6]. Furthermore, the signal is transmitted on a wireless basis to the receiver (See Brown col. 8 lines 47-63) [claim 7]. Brown lacks in disclosing the transmitter located on the individual [claim 6]. Weske et al. teaches of a fencing game in which a transmitter is located on the individual (See Weske et al. col. 3 lines 34-38) [claim 6]. It

would have been obvious to one of ordinary skill in the art at the time the invention was made to have the batter in Brown wear the transmitter as in Weske. By wearing the transmitter, the batter does not have to constantly pick up and put down the remote control device. The transmitter is on them at all times and the pitches can be selected faster versus picking up and using the remote control.

Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brown in view of Lipps in view of Weske in further view of Sharp, U.S. Patent No. 5,133,330. Brown further discloses that the propelling means is intended to propel the ball toward the individual with the striking means (See Brown col. 2 lines 63-67; col. 3 lines 1-8) [claim 9]. Brown and Weske lack in disclosing a delay in the actuation of the propelling means [claim 8]. Sharp teaches of a pitching machine in which when the machine receives the signal to cause the actuation of the propelling means to propel a ball a delay occurs for a short period of time (See Sharp abstract, col. 1 lines 52-54; col. 2 lines 30-34) [claim 8]. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have a delay after the receiver receives the transmitted signal in Brown so that the actuation of the propelling means is delayed. By delaying the throwing of the balls, the players can get into their batting stance and be ready for the pitch versus being surprised immediately by balls being thrown at them.

Claim 31 is rejected under 35 U.S.C. 103(a) as being unpatentable over Brown in view of Weske et al., U.S. Patent No. 6,575,837 B1. Brown discloses all of the limitations mentioned previously. Brown lacks in disclosing the transmitter located on the individual [claim 31]. Weske et al. teaches of a fencing game in which a transmitter is located on the individual (See Weske et al. col. 3 lines 34-38) [claim 31]. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have the batter in Brown wear the transmitter as in Weske. By wearing the transmitter, the batter does not have to constantly pick up and put down the remote control device. The transmitter is on them at all times and the pitches can be selected faster versus picking up and using the remote control.

Response to Amendment

It has been noted that claims 1-5, 7-10, 12-16, 20-22, 27-29 have been amended. Claims 18, 19, 23-26 and 30 have been cancelled. New claim 31 has been added.

Response to Arguments

Applicant's arguments filed January 14, 2005 have been fully considered but they are not persuasive.

Applicant argues that Brown does not teach or suggest the use of a plate on the ground in which the transmitter is located and having the transmitter activated by touching it with a ball striking means to transmit a wireless signal

that causes the ball to be propelled by a propelling means. The Examiner agrees and notes that Lipps teaches of the home plate with the transmitter.

Applicant argues that the combination of Brown and Lipps is improper and that there is no suggestion in Lipps that the buttons on the home plate are used by the batter to select the types of pitches to be tossed to the batter. The Examiner agrees with the fact that Lipps does not allow a player to select the types of pitches this limitation is taught by Brown and notes that Lipps is merely being used as a reference to illustrate that a transmitter can be placed in a home plate for communication with a receiver and that a player can control the transmitter with by pressing buttons with the bat. Lipps teaches that it is obvious to place a transmitter in a home plate so that a player has a realistic batting experience. The Examiner is not attempting to combine the actual video game of Lipps with Brown just the fact that a transmitter can be placed in a plate. In the invention of Brown it doesn't matter where the transmitter is placed, just as long as the player can access it to control the pitching machine. The fact that a player in Lipps does not know the pitches that are being pitched to them does not matter for it to be obvious to place a transmitter in a home plate in the invention of Brown. It is the placement of the transmitter that is in question not the types of pitching being thrown since Brown discloses that claim limitation.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be

established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the **knowledge generally available to one of ordinary skill in the art**. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Brown clearly teaches of the use of a wireless transmitter to control the pitching machine. This transmitter can be placed anywhere for the player to access it as long as the signal can be sent to the pitching machine. By placing the transmitter into a home plate as in the invention of Lipps, the player can use the bat to control the transmitter and therefore can be ready for the pitch. The player does not have to place the bat down, operate the transmitter and then pick up the bat and get into their batting stance. The process is simpler when the transmitter is in a location that is close to the player.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Applicant further argues that there is no control of anything by the person wearing the box on their waist in Weske. The Examiner notes that Weske is used merely to illustrate that a transmitter can be attached to an individual's body not that it controls various aspects of a baseball-pitching machine. Weske illustrates that one can wear a transmitter, therefore it would have been obvious based on general knowledge throughout the art to have a player wear Brown's transmitter so that it is easier for a player to access.

The Examiner notes that the container in which the transmitter of Brown is placed is not a novel aspect of the invention. The Examiner notes based on *In re Dailey*, 149 USPQ 47 (CCPA 1976), changes in form or shape are obvious. In this application, whether a player wears the transmitter or places it in a home plate, it is obvious to change the location of the transmitter for convenience as long as it is still functional.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

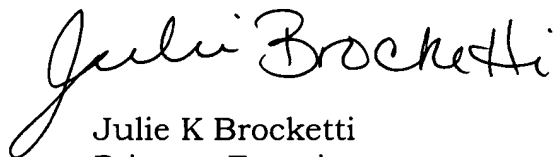
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37

CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Julie K Brockett whose telephone number is 571-272-4432. The examiner can normally be reached on M-Th 8:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Xuan Thai can be reached on 571-272-7147. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Julie K Brockett
Primary Examiner
Art Unit 3713